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Part V

**Department of
Defense**

**General Services
Administration**

**National Aeronautics
and Space
Administration**

**48 CFR Parts 1, 4, 8, et al.
Federal Acquisition Regulations; Rules**

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1**

[Docket FAR 2010–0076, Sequence 8]

**Federal Acquisition Regulation;
Federal Acquisition Circular 2005–46;
Introduction**

AGENCY: Department of Defense (DoD),
General Services Administration (GSA),

and National Aeronautics and Space
Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–46. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–46 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–46

Item	Subject	FAR Case	Analyst
I	Equal Opportunity for Veterans (Interim)	2009–007	Woodson
II	Certification Requirement and Procurement Prohibition Relating to Iran Sanctions (Interim).	2010–012	Davis
III	Termination for Default Reporting	2008–016	Parnell
IV	Award-Fee Language Revision	2008–008	Chambers
V	Offering a Construction Requirement–8(a) Program	2009–020	Morgan
VI	Encouraging Contractor Policies to Ban Text Messaging While Driving (Interim)	2009–028	Clark
VII	Buy American Exemption for Commercial Information Technology—Construction Material (Interim).	2009–039	Davis

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–46 amends the FAR as specified below:

**Item I—Equal Opportunity for Veterans
(FAR Case 2009–007) (Interim)**

This interim rule with request for comments implements the Department of Labor's (DoL) Office of Federal Contract Compliance Programs (OFCCP) final rule published in the **Federal Register** at 72 FR 44393 on August 8, 2007, that implements amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA), as amended by the Jobs for Veterans Act (JVA). The rule re-titles FAR subpart 22.13 from "Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans" to "Equal Opportunity for Veterans." Accordingly, FAR clause 52.222–35 is also renamed "Equal Opportunity for Veterans" and incorporates the new categories and definitions of protected veterans as established by DoL. In addition, the FAR clause at 52.222–37, "Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other

Eligible Veterans" is renamed "Employment Reports on Veterans" and the new DoL requirements for using the VETS–100A report are incorporated. Lastly, the FAR provision at 52.222–38, "Compliance with Veterans' Employment Reporting Requirements," is revised to incorporate new title references for FAR 52.222–37 and the new report form VETS–100A.

**Item II—Certification Requirement and
Procurement Prohibition Relating to
Iran Sanctions (FAR Case 2010–012)
(Interim)**

This interim rule amends the FAR by enhancing efforts to enforce sanctions with Iran. The rule implements requirements imposed by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111–195), specifically sections 102 and 106. To implement section 102, the FAR will require certification that each offeror, and any person owned or controlled by the offeror, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act. This rule also partially implements section 106 of Public Law 111–195, which imposes a procurement prohibition relating to contracts with persons that export certain sensitive technology to Iran. There will be further implementation of Section 106 in FAR

Case 2010–018. This rule will have little effect on United States small business concerns, because such dealings with Iran are already prohibited in the United States.

**Item III—Termination for Default
Reporting (FAR Case 2008–016)**

This final rule amends the FAR to revise the contractor performance information process. The FAR revisions include changes to FAR parts 8, 12, 15, 42, and 49. The purpose of the rule is to establish procedures for contracting officers to provide contractor information into the Federal Awardee Performance & Integrity Information System (FAPIS) module of Past Performance Information System (PPIRS). This case sets forth requirements for reporting defective cost or pricing data and terminations for cause or default and any amendments. Evaluation of past performance information, especially terminations, manages risks associated with timely, effective and cost efficient completion of contracts, a key objective of the President's March 4, 2009, Memorandum on Government Contracting.

**Item IV—Award-Fee Language
Revision (FAR Case 2008–008)**

This final rule converts the interim rule published in the **Federal Register** at

74 FR 52856 on October 14, 2009, to a final rule with minor changes.

This final rule amends the FAR to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 and section 867 of the Duncan Hunter 2009 National Defense Authorization Act for Fiscal Year 2009. This rule requires agencies to—

(1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;

(2) Clarify that a base fee amount greater than zero may be included in a cost-plus-award-fee type contract at the discretion of the contracting officer;

(3) Prescribe narrative ratings that will be utilized in award-fee evaluations;

(4) Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;

(5) Conduct a risk and cost-benefit analysis and consider the results of the analysis when determining whether to use an incentive-fee type contract or not;

(6) Include specific content in the award-fee plans; and

(7) Prohibit the rolling over of unearned award fees to subsequent rating periods.

This FAR change will integrate where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

Item V—Offering a Construction Requirement—8(a) Program (FAR Case 2009–020)

This final rule amends the FAR to revise FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), specifically FAR 19.804–2(b) to conform to the Small Business Administration (SBA) regulations. The SBA regulation 13 CFR 124.502(b)(2) requires that the offering letter for an open construction requirement be submitted to the SBA District Office for the geographical area where the work is to be performed. The SBA regulation 13 CFR 124.502(b)(3) requires that the offering letter for a construction requirement offered on behalf of a specific participant be submitted to the SBA District Office servicing that concern. This rule revises FAR 19.804–2 accordingly.

Item VI—Encouraging Contractor Policies To Ban Text Messaging While Driving (FAR Case 2009–028) (Interim)

This interim rule amends the FAR to implement Executive Order 13513, entitled “Federal Leadership on

Reducing Text Messaging while Driving,” which was issued on October 1, 2009 (74 FR 51225, October 6, 2009). Section 4 of the Executive order requires each Federal agency, in procurement contracts, entered into after the date of the order, to encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while driving company-owned or -rented vehicles or Government-owned vehicles; or privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government. Section 4 also requires Federal agencies to encourage contractors to conduct initiatives such as establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving, and education, awareness, and other outreach programs to inform employees about the safety risks associated with texting while driving. This requirement applies to all solicitations and contracts. Contracting officers are encouraged to modify existing contracts to include the FAR clause.

Item VII—Buy American Exemption for Commercial Information Technology—Construction Material (FAR Case 2009–039) (Interim)

This interim rule implements section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117). Section 615 authorizes exemption from the Buy American Act for acquisition of information technology that is a commercial item.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

[FR Doc. 2010–24217 Filed 9–28–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 22, and 52

[FAC 2005–46; FAR Case 2009–007; Item I; Docket 2010–0101, Sequence 1]

RIN 9000–AL67

Federal Acquisition Regulation; Equal Opportunity for Veterans

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Department of Labor (DoL) regulations on equal opportunity provisions for various categories of military veterans. This rule sets forth revised coverage and definitions of veterans covered under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA) and includes new reporting requirements established under the VEVRAA and the Jobs for Veterans Act (JVA).

DATES: *Effective Date:* September 29, 2010.

Applicability date: Contracting officers may modify existing contracts of \$100,000 or more that were awarded or modified on or after December 1, 2003, to require the use of the new VETS–100A form starting with the report filed September 30, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before November 29, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–46, FAR Case 2009–007, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–007” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009–007.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–007” on your attached document.

- *Fax:* 202–501–4067.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–46, FAR Case 2009–007, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr.

Ernest Woodson, Procurement Analyst, at (202) 501-3775. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-46, FAR Case 2009-007.

SUPPLEMENTARY INFORMATION:

A. Background

The DoL Office of Federal Contract Compliance Programs (OFCCP) published a final rule in the **Federal Register** at 72 FR 44393 on August 8, 2007, that implements amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA) as amended by the Jobs for Veterans Act (JVA), Public Law 107-288. This final DoL rule changed the categories of veterans protected by these laws for covered Government contracts entered into or modified on or after December 1, 2003. These changes were published in 41 CFR part 60-300 and specifically modified the equal opportunity clause to be included in each covered Government contract or subcontract.

The JVA amendments eliminated listing employment openings solely with America's Job Bank as an option for complying with the mandatory job listing requirement. The final DoL rule provides that listing employment openings with the State workforce agency job bank or with the local employment service delivery system where the opening occurs will satisfy the requirement to list job openings with the appropriate employment service delivery system.

The categories of veterans covered by the equal opportunity provisions changed to include: Disabled Veterans, Recently Separated Veterans, Other Protected Veterans, and Armed Forces Service Medal Veterans. The JVA eliminated the separate coverage category of Vietnam-era veterans; however, DoL in its rule explained that many people in this category may be covered under the other categories. The JVA expanded the coverage of veterans with disabilities to all veterans who were discharged or released from active duty because of a service-connected disability.

In addition, the DoL Veterans' Employment and Training Service (VETS) published a final rule in the **Federal Register** at 73 FR 28710 on May 19, 2008, that further implements the requirements under the VEVRAA and the JVA that Government contractors track and annually report the number of veteran employees in their workforces. This final DoL rule adopted a new Federal Contractor Veterans' Employment Report, VETS-100A form,

to be used for reporting the revised categories of veterans that contractors are to track and report. These reporting requirements are published in 41 CFR part 61-300 and require each covered contract or subcontract contain the clause for reporting using the new VETS-100A form for contracts entered into or modified on or after December 1, 2003. The new VETS-100A form was required to be used for the report to be filed by September 30, 2009.

This interim FAR rule re-titles FAR subpart 22.13 from "Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans" to "Equal Opportunity for Veterans." Accordingly, FAR clause 52.222-35 is also renamed "Equal Opportunity for Veterans" and incorporates the new categories and definitions of protected veterans as established by DoL. In addition, the FAR clause at 52.222-37, "Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans," is renamed "Employment Reports on Veterans" and the new DoL requirements for using the VETS-100A report are incorporated. Lastly, the FAR provision at 52.222-38, "Compliance with Veterans' Employment Reporting Requirements," is revised to incorporate new title references for FAR 52.222-37 and the new report form VETS-100A.

The interim rule also makes conforming changes to the lists of FAR clauses in 52.212-5, 52.213-4, and 52.244-6.

This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because contractors are already required to annually track and report their veteran workforces on the VETS-100 form in accordance with VEVRAA. This rule implements a new form, VETS-100A, that simply includes the revised categories of veterans for reporting purposes. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities

concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-46, FAR Case 2009-007) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 1293-0005 and 1215-0072.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement the Department of Labor (DoL) final rule on Veterans' Employment and Training Service (VETS) published in the **Federal Register** at 73 FR 28710 on May 19, 2008, and a DoL final rule, published in the **Federal Register** on August 8, 2007, that implements amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA), as amended by the Jobs for Veterans Act (JVA). However, pursuant to 41 U.S.C. 418b and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory text, by removing from FAR segment 22.13 OMB

Control Number “1215–0072” and adding “1293–0005 and 1215–0072” in its place; and adding, in numerical sequence, FAR segment “52.222–37” and its corresponding OMB Control Number “1293–0005”.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

- 3. Revise the heading of subpart 22.13 to read as follows:

Subpart 22.13—Equal Opportunity for Veterans

- 4. Revise sections 22.1300, 22.1301, and 22.1302 to read as follows:

22.1300 Scope of subpart.

This subpart prescribes policies and procedures for implementing the following:

- (a) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 (38 U.S.C. 4211 and 4212) (the Act).
- (b) The Veterans Employment Opportunities Act of 1998, Public Law 105–339.
- (c) The Jobs for Veterans Act, Public Law 107–288.
- (d) Executive Order 11701, January 24, 1973 (3 CFR, 1971–1975 Comp., p. 752).
- (e) The regulations of the Secretary of Labor (41 CFR part 60–250, part 61–250, part 60–300, and part 61–300).

22.1301 Definitions.

As used in this subpart—

Armed Forces service medal veteran means any veteran who, while serving on active duty in the U.S. military, ground, naval, or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209).

Disabled veteran means—

- (1) A veteran of the U.S. military, ground, naval, or air service, who is entitled to compensation (or who, but for the receipt of military retired pay, would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or
- (2) A person who was discharged or released from active duty because of a service-connected disability.

Other protected veteran means a veteran who served on active duty in the U.S. military, ground, naval, or air service, during a war or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.

Qualified disabled veteran means a disabled veteran who has the ability to

perform the essential functions of the employment positions with or without reasonable accommodation.

Recently separated veteran means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval, or air service.

United States, means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.1302 Policy.

(a) Contractors and subcontractors, when entering into contracts or subcontracts subject to the Act, must—

- (1) List all employment openings, with the appropriate employment service delivery system where the opening occurs, except for—
 - (i) Executive and senior management positions;
 - (ii) Positions to be filled from within the contractor's organization; and
 - (iii) Positions lasting three days or less.
- (2) Take affirmative action to employ, advance in employment, and otherwise treat qualified individuals, including qualified disabled veterans, without discrimination based upon their status as a disabled veteran, recently separated veteran, other protected veteran, and Armed Forces service medal veteran, in all employment practices.

(b) Except for contracts for commercial items or contracts that do not exceed the simplified acquisition threshold, contracting officers must not obligate or expend funds appropriated for the agency for a fiscal year to enter into a contract for the procurement of personal property and nonpersonal services (including construction) with a contractor that has not submitted the required annual form VETS–100, Federal Contractor Veterans' Employment Report (VETS–100 Report and/or VETS–100A Report), with respect to the preceding fiscal year if the contractor was subject to the reporting requirements of 38 U.S.C. 4212(d) for that fiscal year.

(c) Except for contracts for commercial items or contracts that do not exceed the simplified acquisition threshold, contracting officers must not obligate or expend funds appropriated for the agency for a fiscal year to enter into a contract for the procurement of personal property and nonpersonal services (including construction) with a contractor that has not submitted the required annual form VETS–100, Federal Contractor Veterans' Employment Report (VETS–100 Report and/or VETS–100A Report), with respect to the preceding fiscal year if the contractor was subject to the reporting requirements of 38 U.S.C. 4212(d) for that fiscal year.

22.1303 [Amended]

- 5. Amend section 22.1303 by removing from paragraph (b) “Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible”; and removing from paragraph (c) “VETS–100 Report” and adding “VETS–100A Report” in its place.

- 6. Amend section 22.1304 by revising the introductory text, and paragraph (a) to read as follows:

22.1304 Procedures.

To verify if a proposed contractor is current with its submission of the VETS–100 and/or the VETS–100A Report, the contracting officer may—

- (a) Query the Department of Labor's VETS–100 Database via the Internet at <http://www.vets100.com/login.aspx>. Contracting officer organization, name, e-mail, telephone, and password information are required on the Contracting Officer Registration page to register for system use.

* * * * *

- 7. Amend section 22.1305 by revising the introductory text of paragraph (a) to read as follows:

22.1305 Waivers.

- (a) The Director, Office of Federal Contract Compliance Programs, Department of Labor, may waive any or all of the terms of the clause at 52.222–35, Equal Opportunity for Veterans, for—

* * * * *

- 8. Revise section 22.1306 to read as follows:

22.1306 Department of Labor notices and reports.

- (a) The contracting officer must furnish to the contractor appropriate notices for posting when they are prescribed by the Deputy Assistant Secretary of Labor (see <http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm>).

(b) The Act requires contractors and subcontractors to submit a report at least annually to the Secretary of Labor regarding employment of disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans, unless all of the terms of the clause at 52.222–35, Equal Opportunity for Veterans, have been waived (see 22.1305). The contractor and subcontractor must use form VETS–100A, Federal Contractor Veterans' Employment Report, to submit the required reports (see <https://vets100.vets.dol.gov>).

22.1307 [Amended]

- 9. Amend section 22.1307 by removing the words “Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible”.

- 10. Revise section 22.1308 to read as follows:

22.1308 Complaint procedures.

Following agency procedures, the contracting office must forward any complaints received about the administration of the Act to the Veterans' Employment and Training

Service of the Department of Labor, or to the Director, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Washington, DC 20210, or to any OFCCP regional, district, or area office or through the local Veterans' Employment Representative or designee, at the local State employment office. The Director, Office of Federal Contract Compliance Programs, is responsible for investigating complaints.

■ 11. Amend section 22.1309 by revising the introductory text, and paragraph (a) to read as follows:

22.1309 Actions because of noncompliance.

The contracting officer must take necessary action as soon as possible upon notification by the appropriate agency official to implement any sanctions imposed on a contractor by the Department of Labor for violations of the clause at 52.222–35, Equal Opportunity for Veterans. These sanctions (see 41 CFR 60–300.66) may include—

(a) Withholding progress payments;

* * * * *

■ 12. Amend section 22.1310 by revising paragraphs (a) and (b) to read as follows:

22.1310 Solicitation provision and contract clauses.

(a)(1) Insert the clause at 52.222–35, Equal Opportunity for Veterans, in solicitations and contracts if the expected value is \$100,000 or more, except when—

(i) Work is performed outside the United States by employees recruited outside the United States; or

(ii) The Director, Office of Federal Contract Compliance Programs, has waived, in accordance with 22.1305(a) or the head of the agency has waived, in accordance with 22.1305(b) all of the terms of the clause.

(2) If the Director, Office of Federal Contract Compliance Programs, or the head of the agency waives one or more (but not all) of the terms of the clause, use the basic clause with its Alternate I.

(b) Insert the clause at 52.222–37, Employment Reports on Veterans, in solicitations and contracts containing the clause at 52.222–35, Equal Opportunity for Veterans.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 13. Amend section 52.212–5 by revising the date of the clause, paragraphs (b)(24), (b)(26), and (e)(1)(v);

and the date of Alternate II and paragraph (e)(1)(ii)(E) of Alternate II to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (SEP 2010)

* * * * *

(b) * * *

—(24) 52.222–35, Equal Opportunity for Veterans (SEP 2010) (38 U.S.C. 4212).

* * * * *

—(26) 52.222–37, Employment Reports on Veterans (SEP 2010) (38 U.S.C. 4212).

* * * * *

(e)(1) * * *

(v) 52.222–35, Equal Opportunity for Veterans (SEP 2010) (38 U.S.C. 4212).

* * * * *

Alternate II (SEP 2010). * * *

* * * * *

(e)(1) * * *

(ii) * * *

(E) 52.222–35, Equal Opportunity for Veterans (SEP 2010) (38 U.S.C. 4212).

* * * * *

■ 14. Amend section 52.213–4 by revising the date of the clause, and paragraphs (a)(2)(vii), (b)(1)(iii) and (b)(1)(v) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) (SEP 2010)

(a) * * *

(2) * * *

(vii) 52.244–6, Subcontracts for Commercial Items (SEP 2010).

* * * * *

(b) * * *

(1) * * *

(iii) 52.222–35, Equal Opportunity for Veterans (SEP 2010) (38 U.S.C. 4212) (applies to contracts of \$100,000 or more).

* * * * *

(v) 52.222–37, Employment Reports on Veterans (SEP 2010) (38 U.S.C. 4212) (applies to contracts of \$100,000 or more).

* * * * *

■ 15. Revise section 52.222–35 to read as follows:

52.222–35 Equal Opportunity for Veterans.

As prescribed in 22.1310(a)(1), insert the following clause:

EQUAL OPPORTUNITY FOR VETERANS (SEP 2010)

(a) *Definitions.* As used in this clause—
All *employment openings* means all positions except executive and senior management, those positions that will be filled from within the Contractor's organization, and positions lasting 3 days or less. This term includes full-time employment, temporary employment of more than 3 days duration, and part-time employment.

Armed Forces service medal veteran means any veteran who, while serving on active duty in the U.S. military, ground, naval, or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209).

Disabled veteran means—

(1) A veteran of the U.S. military, ground, naval, or air service, who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or

(2) A person who was discharged or released from active duty because of a service-connected disability.

Executive and senior management means—(1) Any employee—

(i) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(ii) Whose primary duty consists of the management of the enterprise in which the individual is employed or of a customarily recognized department or subdivision thereof;

(iii) Who customarily and regularly directs the work of two or more other employees; and

(iv) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; or

(2) Any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.

Other protected veteran means a veteran who served on active duty in the U.S. military, ground, naval, or air service, during a war or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.

Positions that will be filled from within the Contractor's organization means employment openings for which the Contractor will give no consideration to persons outside the Contractor's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings the Contractor proposes to fill from regularly established "recall" lists. The exception does not apply to a particular opening once an

employer decides to consider applicants outside of its organization.

Qualified disabled veteran means a disabled veteran who has the ability to perform the essential functions of the employment positions with or without reasonable accommodation.

Recently separated veteran means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service.

(b) *General.* (1) The Contractor shall not discriminate against any employee or applicant for employment because the individual is a disabled veteran, recently separated veteran, other protected veterans, or Armed Forces service medal veteran, regarding any position for which the employee or applicant for employment is qualified. The Contractor shall take affirmative action to employ, advance in employment, and otherwise treat qualified individuals, including qualified disabled veterans, without discrimination based upon their status as a disabled veteran, recently separated veteran, Armed Forces service medal veteran, and other protected veteran in all employment practices including the following:

(i) Recruitment, advertising, and job application procedures.

(ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring.

(iii) Rate of pay or any other form of compensation and changes in compensation.

(iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.

(v) Leaves of absence, sick leave, or any other leave.

(vi) Fringe benefits available by virtue of employment, whether or not administered by the Contractor.

(vii) Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training.

(viii) Activities sponsored by the Contractor including social or recreational programs.

(ix) Any other term, condition, or privilege of employment.

(2) The Contractor shall comply with the rules, regulations, and relevant orders of the Secretary of Labor issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (the Act), as amended (38 U.S.C. 4211 and 4212).

(3) The Department of Labor's regulations require contractors with 50 or more employees and a contract of \$100,000 or more to have an affirmative action program for veterans. See 41 CFR part 60–300, subpart C.

(c) *Listing openings.* (1) The Contractor shall immediately list all employment openings that exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by

this contract, and including those occurring at an establishment of the Contractor other than the one where the contract is being performed, but excluding those of independently operated corporate affiliates, at an appropriate employment service delivery system where the opening occurs. Listing employment openings with the State workforce agency job bank or with the local employment service delivery system where the opening occurs shall satisfy the requirement to list jobs with the appropriate employment service delivery system.

(2) The Contractor shall make the listing of employment openings with the appropriate employment service delivery system at least concurrently with using any other recruitment source or effort and shall involve the normal obligations of placing a bona fide job order, including accepting referrals of veterans and nonveterans. This listing of employment openings does not require hiring any particular job applicant or hiring from any particular group of job applicants and is not intended to relieve the Contractor from any requirements of Executive orders or regulations concerning nondiscrimination in employment.

(3) Whenever the Contractor becomes contractually bound to the listing terms of this clause, it shall advise the State workforce agency in each State where it has establishments of the name and location of each hiring location in the State. As long as the Contractor is contractually bound to these terms and has so advised the State agency, it need not advise the State agency of subsequent contracts. The Contractor may advise the State agency when it is no longer bound by this contract clause.

(d) *Applicability.* This clause does not apply to the listing of employment openings that occur and are filled outside the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

(e) *Postings.* (1) The Contractor shall post employment notices in conspicuous places that are available to employees and applicants for employment.

(2) The employment notices shall—

(i) State the rights of applicants and employees as well as the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are disabled veterans, recently separated veterans, Armed Forces service medal veterans, and other protected veterans; and

(ii) Be in a form prescribed by the Director, Office of Federal Contract Compliance Programs, and provided by or through the Contracting Officer.

(3) The Contractor shall ensure that applicants or employees who are disabled veterans are informed of the contents of the notice (e.g., the Contractor may have the notice read to a visually disabled veteran, or may lower the posted notice so that it can be read by a person in a wheelchair).

(4) The Contractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement, or other contract understanding,

that the Contractor is bound by the terms of the Act and is committed to take affirmative action to employ, and advance in employment, qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans.

(f) *Noncompliance.* If the Contractor does not comply with the requirements of this clause, the Government may take appropriate actions under the rules, regulations, and relevant orders of the Secretary of Labor. This includes implementing any sanctions imposed on a contractor by the Department of Labor for violations of this clause (52.222–35, Equal Opportunity for Veterans). These sanctions (see 41 CFR 60–300.66) may include—

(1) Withholding progress payments;

(2) Termination or suspension of the contract; or

(3) Debarment of the contractor.

(g) *Subcontracts.* The Contractor shall insert the terms of this clause in subcontracts of \$100,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor. The Contractor shall act as specified by the Director, Office of Federal Contract Compliance Programs, to enforce the terms, including action for noncompliance.

(End of clause)

Alternate I (Dec 2001). As prescribed in 22.1310(a)(2), add the following as a preamble to the clause:

Notice: The following term(s) of this clause are waived for this contract:

[List term(s)].

16. Revise section 52.222–37 to read as follows:

52.222–37 Employment Reports on Veterans.

As prescribed in 22.1310(b), insert the following clause:

EMPLOYMENT REPORTS ON VETERANS (SEP 2010)

(a) *Definitions.* As used in this clause, “Armed Forces service medal veteran,” “disabled veteran,” “other protected veteran,” and “recently separated veteran,” have the meanings given in the Equal Opportunity for Veterans clause 52.222–35.

(b) Unless the Contractor is a State or local government agency, the Contractor shall report at least annually, as required by the Secretary of Labor, on—

(1) The total number of employees in the contractor's workforce, by job category and hiring location, who are disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans.

(2) The total number of new employees hired during the period covered by the report, and of the total, the number of disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans; and

(3) The maximum number and minimum number of employees of the Contractor or subcontractor at each hiring location during the period covered by the report.

(c) The Contractor shall report the above items by completing the Form VETS–100A,

entitled "Federal Contractor Veterans' Employment Report (VETS-100A Report)."

(d) The Contractor shall submit VETS-100A Reports no later than September 30 of each year.

(e) The employment activity report required by paragraphs (b)(2) and (b)(3) of this clause shall reflect total new hires, and maximum and minimum number of employees, during the most recent 12-month period preceding the ending date selected for the report. Contractors may select an ending date—

(1) As of the end of any pay period between July 1 and August 31 of the year the report is due; or

(2) As of December 31, if the Contractor has prior written approval from the Equal Employment Opportunity Commission to do so for purposes of submitting the Employer Information Report EEO-1 (Standard Form 100).

(f) The number of veterans reported must be based on data known to the contractor when completing the VETS-100A. The contractor's knowledge of veterans status may be obtained in a variety of ways, including an invitation to applicants to self-identify (in accordance with 41 CFR 60-300.42), voluntary self-disclosure by employees, or actual knowledge of veteran status by the contractor. This paragraph does not relieve an employer of liability for discrimination under 38 U.S.C. 4212.

(g) The Contractor shall insert the terms of this clause in subcontracts of \$100,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor.

(End of clause)

■ 17. Amend section 52.222-38 by revising the date of the provision and the provision to read as follows:

52.222-38 Compliance with Veterans' Employment Reporting Requirements.

* * * * *

COMPLIANCE WITH VETERANS' EMPLOYMENT REPORTING REQUIREMENTS (SEP 2010)

By submission of its offer, the offeror represents that, if it is subject to the reporting requirements of 38 U.S.C. 4212(d) (*i.e.*, if it has any contract containing Federal Acquisition Regulation clause 52.222-37, Employment Reports on Veterans), it has submitted the most recent VETS-100A Report required by that clause.

(End of provision)

■ 18. Amend section 52.244-6 by revising the date of the clause and paragraph (c)(1)(v) to read as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (SEP 2010)

* * * * *

(c)(1) * * *

(v) 52.222-35, Equal Opportunity for Veterans (SEP 2010) (38 U.S.C. 4212(a));

* * * * *

[FR Doc. 2010-24218 Filed 9-28-10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 25 and 52

[FAC 2005-46; FAR Case 2010-012; Item II; Docket 2010-0102, Sequence 1]

RIN 9000-AL71

Federal Acquisition Regulation; Certification Requirement and Procurement Prohibition Relating to Iran Sanctions

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 102 and partially implements section 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010. Section 102 requires certification that each offeror, and any person owned or controlled by the offeror, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996, as amended (the Iran Sanctions Act). Section 106 imposes a procurement prohibition relating to contracts with persons that export certain sensitive technology to Iran. There will be further implementation of section 106 in FAR Case 2010-018.

DATES: *Effective Date:* September 29, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before November 29, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-46, FAR Case 2010-012, by any of the following methods:

• *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2010-012" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "FAR Case 2010-012." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2010-012" on your attached document.

• *Fax:* 202-501-4067.

• *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Attn: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-46, FAR Case 2010-012, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219-0202. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-46, FAR Case 2010-012.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements section 102 and partially implements section 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195), enacted July 1, 2010. Section 102, entitled "Expansion of Sanctions under the Iran Sanctions Act of 1996," requires that, not later than 90 days after the date of the enactment of Public Law 111-195, the FAR shall be revised to require a certification from each person that is a prospective contractor that the person, and any person owned or controlled by the person, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act.

This interim rule has added in FAR subpart 25.7 a new section 25.703, Prohibition on contracting with entities that engage in certain activities relating to Iran. This section provides a definition of "person" at FAR 25.703-1, which is applicable to both of the following subsections.

FAR 25.703-2 implements section 102 of Public Law 111-195. It explains the certification requirement at FAR 25.703-2(a) and provides a summary of the activities for which sanctions may be imposed, which are described in

more detail in section 5 of the Iran Sanctions Act.

Remedies are located at FAR 25.703–2(b). If the head of an executive agency determines that a person has submitted a false certification, the agency shall take one or more of the following actions:

- (1) The contracting officer may terminate the contract.
- (2) The suspending official may suspend the contractor in accordance with the procedures in FAR subpart 9.4.
- (3) The debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in FAR subpart 9.4.

Section 102 also provides that the remedies set forth shall not apply with respect to the procurement of eligible products, as defined in section 308(4) of the Trade Agreements Act of 1974 (19 U.S.C. 2518(4)), of any foreign country or instrumentality designated under section 301(b) of that Act (19 U.S.C. 2511(b)). The Councils interpreted this provision to mean that in acquisitions that are subject to trade agreements, eligible products from designated countries are not subject to the certification requirement (FAR 25.703–2(c)) or the remedies.

This interim rule establishes a waiver procedure at FAR 25.703–2(d), as authorized by the statute. The President may waive the requirement of subsection 25.703–2(a) on a case-by-case basis, if the President determines and certifies in writing to the appropriate congressional committees (Committee on Armed Services of the Senate, Committee on Finance of the Senate, Committee on Banking, Housing, and Urban Affairs of the Senate, Committee on Foreign Relations of the Senate, Committee on Armed Services of the House of Representatives, Committee on Ways and Means of the House of Representatives, Committee on Financial Services of the House of Representatives, and Committee on Foreign Affairs of the House of Representatives) that it is in the national interest to do so. “Appropriate congressional committees” is defined in section 101 of Public Law 111–195, which refers to section 14 of the Iran Sanctions Act, as amended by section 102 paragraph (f) of Public Law 111–195. In addition, section 102 amended section 6 of the Iran Sanctions Act to require certification in writing to the Committee on Armed Services of the Senate and Committee on Armed Services of the House of Representatives, in addition to the “appropriate congressional committees,” as defined in section 14 of the Iran

Sanctions Act. The President may delegate this authority.

The statutory certification requirement is communicated to offerors through a new provision at FAR 52.225–25, Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification. This requirement is also applied to acquisition of commercial items at FAR 52.212–3, paragraph (o) (see Section B, Determinations). Offerors will also be able to make an annual certification through the Online Representations and Certifications Application (ORCA), if the offeror is registered in the Central Contractor Registration. Therefore, conforming changes have been made to FAR part 4 and the FAR clause at 52.204–8, Annual Representations and Certifications.

Section 106 of Public Law 111–195 (22 U.S.C. 8515) is partially implemented in new FAR subsection 25.703–3. Agencies are prohibited from entering into or extending a contract for the procurement of goods or services with a person that exports certain sensitive technology to Iran, as determined by the President and listed on the Excluded Parties List System. There will be further implementation of section 106 in FAR Case 2010–018.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Determinations

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule’s applicability of section 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111–195), to contracts in amounts not greater than the simplified acquisition threshold (SAT), contracts for the acquisition of commercial items, and contracts for the acquisition of commercially available off-the-shelf (COTS) items.

1. *Applicability to Contracts at or Below the Simplified Acquisition Threshold*

Section 4101 of Pub. L. 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or

below the SAT, the law will apply to them. Therefore, given that the requirements of sections 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 were enacted to widen the sanctions against Iran, the FAR Council has determined that it is in the best interest of the Federal Government to apply this rule to all acquisitions including contracts at or below the SAT, as defined at FAR 2.101. An exception for acquisitions at or below the SAT would exclude a significant portion of Federal contracting and the contractors who provide these products and services, thereby undermining the overarching public policy purpose of the law.

2. *Applicability to Contracts for the Acquisition of Commercial Items*

Section 8003 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 430), governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items.

FASA provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Therefore, given that the requirements of sections 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 were enacted to widen the sanctions against Iran, the FAR Council has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items would exclude a significant portion of Federal contracting and the contractors who provide these products and services, thereby undermining the overarching public policy purpose of the law.

3. *Applicability to Contracts for the Acquisition of (COTS) Items*

Section 4203 of Public Law 104–106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to contracts for the acquisition of COTS items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement Policy makes a written

determination that it is not in the best interest of the Federal Government to exempt contracts for the acquisition of COTS items, the provision of law will apply. Therefore, given that the requirements of sections 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 were enacted to widen the sanctions against Iran, the Administrator for Federal Procurement Policy has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of COTS items would exclude a significant portion of Federal contracting and the contractors who provide these products and services, thereby undermining the overarching public policy purpose of the law.

C. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule will only have significant impact on an offeror that is engaging in an activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act or that is exporting sensitive technology to Iran. Domestic entities generally do not engage in activity that would cause them to be subject to the procurement bans described in this rule due to current restrictions on trade with Iran (*see, e.g.*, Department of the Treasury Office of Foreign Assets Control regulations at 31 CFR 560). Accordingly, it is expected that the number of domestic entities significantly impacted by this rule will be minimal, if any. The Regulatory Flexibility Act is for the protection of United States small entities, not foreign entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-46, FAR Case 2010-012) in all correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the

FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

E. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the rule implements sections 102 and 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195), which was signed on July 1, 2010. Section 102 must be implemented within 90 days (*i.e.*, September 29, 2010). Section 106 was effective upon enactment banning activity that takes place on or after the date that is 90 days after enactment. However, pursuant to 41 U.S.C. 418b and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4, 25, and 52

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Amend section 4.1202 by redesignating paragraphs (bb), (cc), and (dd) as paragraphs (cc), (dd), and (ee), respectively, and adding a new paragraph (bb) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(bb) 52.225-25, Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification.

* * * * *

PART 25—FOREIGN ACQUISITION

■ 3. Revise section 25.700 to read as follows:

25.700 Scope of subpart.

This subpart implements—

(a) Economic sanctions administered by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury prohibiting transactions involving certain countries, entities, and individuals;

(b) The Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174);

(c) The Iran Sanctions Act of 1996 (Iran Sanctions Act) (Pub. L. 104-172; 50 U.S.C. 1701 note), including amendments by the Iran Freedom Support Act (Pub. L. 109-293) and section 102 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111-195); and

(d) Section 106 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (22 U.S.C. 8515).

■ 4. Amend section 25.701 by revising the section heading to read as follows:

25.701 Restrictions administered by the Department of the Treasury on acquisitions of supplies or services from prohibited sources.

* * * * *

■ 5. Add sections 25.703 through 25.703-3 to read as follows:

25.703 Prohibition on contracting with entities that engage in certain activities relating to Iran.

25.703-1 Definition.

Person—

(1) Means—

(i) A natural person;

(ii) A corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) Any successor to any entity described in paragraph (1)(ii) of this definition; and

(2) Does not include a government or governmental entity that is not operating as a business enterprise.

25.703-2 Iran Sanctions Act.

(a) *Certification.*

(1) As required by the Iran Sanctions Act, unless an exception applies or a waiver is granted in accordance with paragraph (c) or (d) of this subsection, each offeror must certify that the offeror, and any person owned or controlled by the offeror, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act.

(2) In general, the following activities, which are described in detail in section 5 of the Iran Sanctions Act, are activities for which sanctions may be imposed on or after July 1, 2010—

(i) Knowingly making an investment of \$20,000,000 or more, or a combination of investments of \$5,000,000 or more that equal or exceed \$20,000,000 in a 12-month period, that directly and significantly contribute to the enhancement of Iran's ability to develop petroleum resources.

(ii) Knowingly selling, leasing or providing to Iran goods, services, technology, information, or support with a fair market value of \$1,000,000 or more, or during a 12-month period with an aggregate fair market value of \$5,000,000 or more, that could directly and significantly facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products, including any direct and significant assistance with respect to the construction, modernization, or repair of petroleum refineries.

(iii) Knowingly selling or providing to Iran refined petroleum products with a fair market value of \$1,000,000 or more, or during a 12-month period with an aggregate fair market value of \$5,000,000 or more.

(iv) Knowingly selling, leasing, or providing to Iran goods, services, technology, information, or support with a fair market value of \$1,000,000 or more, or during a 12-month period with an aggregate fair market value of \$5,000,000 or more, that could directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products, including—

(A) Certain insurance or reinsurance, underwriting, financing, or brokering for the sale, lease, or provision of such items, or

(B) Providing ships or shipping services to deliver refined petroleum products to Iran.

(v) Exporting, transferring, or otherwise providing to Iran any goods, services, technology or other items knowing that it would contribute materially to the ability of Iran to acquire or develop chemical, biological, or nuclear weapons or related technologies, or acquire or develop destabilizing numbers and types of advanced conventional weapons.

(b) *Remedies.* Upon the determination of a false certification under paragraph (a) of this subsection, the agency shall take one or more of the following actions:

(1) The contracting officer may terminate the contract.

(2) The suspending official may suspend the contractor in accordance with the procedures in subpart 9.4.

(3) The debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in subpart 9.4.

(c) *Exception for trade agreements.* The certification requirements of paragraph (a) of this subsection do not apply with respect to the procurement of eligible products, as defined in section 308(4) of the Trade Agreements Act of 1974 (19 U.S.C. 2518(4)), of any foreign country or instrumentality designated under section 301(b) of that Act (19 U.S.C. 2511(b)) (see subpart 25.4).

(d) *Waiver.* (1) The President may waive the requirement of subsection 25.703–2(a) on a case-by-case basis if the President determines and certifies in writing to the appropriate congressional committees (Committee on Armed Services of the Senate, Committee on Finance of the Senate, Committee on Banking, Housing, and Urban Affairs of the Senate, Committee on Foreign Relations of the Senate, Committee on Armed Services of the House of Representatives, Committee on Ways and Means of the House of Representatives, Committee on Financial Services of the House of Representatives, and Committee on Foreign Affairs of the House of Representatives) that it is in the national interest to do so.

(2) An agency or contractor seeking a waiver of the requirement shall submit the request through the Office of Federal Procurement Policy (OFPP), allowing sufficient time for review and approval. Upon receipt of the waiver request, OFPP shall consult with the President's National Security Council, the Office of Terrorism and Financial Intelligence in the Department of the Treasury, and the Office of Terrorism Finance and Economic Sanctions Policy, Bureau of Economic, Energy, and Business Affairs in the State Department, allowing sufficient time for review and approval.

(3) In general, all waiver requests should include the following information:

(i) Agency name, complete mailing address, and point of contact name, telephone number, and e-mail address.

(ii) Offeror's name, complete mailing address, and point of contact name, telephone number, and e-mail address.

(iii) Description/nature of product or service.

(iv) The total cost and length of the contract.

(v) Justification, with market research demonstrating that no other offeror can provide the product or service and

stating why the product or service must be procured from this offeror, as well as why it is in the national interest for the President to waive the prohibition on contracting with this offeror that conducts activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996.

(vi) Documentation regarding the offeror's past performance and integrity (see the Past Performance Information Retrieval System (including the Federal Awardee Performance Information and Integrity System at <http://www.ppirs.gov>) and any other relevant information).

(vii) Information regarding the offeror's relationship or connection with other firms that conduct activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996.

(viii) The activities in which the offeror is engaged for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996.

25.703–3 Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, section 106.

The head of an executive agency may not enter into or extend a contract for the procurement of goods or services with a person that exports certain sensitive technology to Iran, as determined by the President and listed on the Excluded Parties List System at <https://www.epls.gov/>.

■ 6. Amend section 25.1103 by adding paragraph (e) to read as follows:

25.1103 Other provisions and clauses.

* * * * *

(e) The contracting officer shall include in each solicitation for the acquisition of products or services the provision at 52.225–25, Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 52.204–8 by—

■ a. Revising the date of the clause;

■ b. Adding a sentence to the end of paragraph (c)(1)(xviii); and

■ c. Redesignating paragraph (c)(1)(xix) as paragraph (c)(1)(xx), and adding a new paragraph (c)(1)(xix).

The revised and added text reads as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (SEP 2010)

* * * * *

(c)(1) * * *
(xviii) * * * This provision applies to all solicitations.

(xix) 52.225–25, Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification. This provision applies to all solicitations.

* * * * *

■ 8. Amend section 52.212–3 by—

- a. Revising the date of the clause;
- b. Removing from the introductory text “through (m) of” and adding “through (o) of” in its place;
- c. Removing from the first undesignated paragraph of (b)(2) “through (n) of” and adding “through (o) of” in its place; and
- d. Adding paragraph (o).

The revised and added text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (SEP 2010)

* * * * *

(o) Sanctioned activities relating to Iran. (1) Unless a waiver is granted or an exception applies as provided in paragraph (o)(2) of this provision, by submission of its offer, the offeror certifies that the offeror, or any person owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996.

(2) The certification requirement of paragraph (o)(1) of this provision does not apply if—

- (i) This solicitation includes a trade agreements certification (e.g., 52.212–3(g) or a comparable agency provision); and
- (ii) The offeror has certified that all the offered products to be supplied are designated country end products.

* * * * *

■ 9. Add section 52.225–25 to read as follows:

52.225–25 Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification.

As prescribed at 25.1103(e), insert the following provision:

PROHIBITION ON ENGAGING IN SANCTIONED ACTIVITIES RELATING TO IRAN—CERTIFICATION (SEP 2010)

(a) *Definition.*

Person—

(1) Means—

- (i) A natural person;
- (ii) A corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) Any successor to any entity described in paragraph (1)(ii) of this definition; and

(2) Does not include a government or governmental entity that is not operating as a business enterprise.

(b) *Certification.* Except as provided in paragraph (c) of this provision or if a waiver has been granted in accordance with FAR 25.703–2(d), by submission of its offer, the offeror certifies that the offeror, or any person owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996. These sanctioned activities are in the areas of development of the petroleum resources of Iran, production of refined petroleum products in Iran, sale and provision of refined petroleum products to Iran, and contributing to Iran's ability to acquire or develop certain weapons.

(c) *Exception for trade agreements.* The certification requirement of paragraph (b) of this provision does not apply if—

(1) This solicitation includes a trade agreements certification (e.g., 52.225–4, 52.225–11 or comparable agency provision); and

(2) The offeror has certified that all the offered products to be supplied are designated country end products or designated country construction material.

(End of provision)

[FR Doc. 2010–24165 Filed 9–28–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 12, 15, 42, and 49

[FAC 2005–46; FAR Case 2008–016; Item III; Docket 2009–0032, Sequence 1]

RIN 9000–AL45

Federal Acquisition Regulation; Termination for Default Reporting

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to establish procedures for contracting officers to provide contractor information, such as terminations for cause or default and defective cost or pricing data, into the Past Performance Information System (PPIRS) and Federal Awardee Performance and Integrity Information

System (FAPIS) module within PPIRS. This information will assist the contracting officer in making an informed source selection and award decision. Instructions on access to the FAPIS module and how to input data into the FAPIS module will be available at <http://www.ppirs.gov/fapiis.html>.

DATES: *Effective Date:* October 29, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Jeritta Parnell, Procurement Analyst, at (202) 501–4082. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–46, FAR case 2008–016.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils have agreed on a final rule amending the FAR to revise the contractor performance information process. This case sets forth requirements for contracting officers to report defective cost or pricing data and terminations for cause or default into the FAPIS module of the PPIRS. Evaluation of past performance information, especially terminations, manages risks associated with timely, effective, and cost efficient completion of contracts, a key objective of the President's March 4, 2009, Memorandum on Government Contracting.

The Councils published in the *Federal Register* at 74 FR 45394 on September 2, 2009, a proposed rule with request for comments. Four respondents submitted fifteen comments.

B. Discussion of Public Comments

The comments received were grouped under six general topics. A summary of these topics and a discussion of the comments and the changes made to the proposed rule as a result of those comments are provided below:

1. Certification Regarding Responsibility Matters

Comment: One respondent recommended deletion of the certification on terminations found in FAR clause 52.209–5, Certification Regarding Responsibility Matters, since the information concerning terminations will be available to contracting officers in PPIRS. The respondent further suggested that conforming deletions should also be made at FAR 52.204–8(c)(1)(v) and in the Online Representations and Certifications Application (ORCA) Web site.

Response: The Councils disagree. PPIRS is the repository for

determinations made by contracting officers. PPIRS is not a repository for certifications made by contractors when certifications are required. Executive order 12689 requires the inclusion of the certification at FAR 52.209–5. FAR 9.105–1 also requires contracting officers to consider contractor certifications in making a contractor determination of responsibility.

2. Contractor Rebuttal

Comment: Two of the four respondents submitted comments requesting that the contractor be given an opportunity to post rebutting statements and additional information into PPIRS and this information be retained as long as the fundamental information is retained in PPIRS.

Response: When termination records are posted in the FAPIIS module of PPIRS, contractors will have an opportunity to provide additional information as required by section 872 of the Duncan Hunter National Defense Authorization Act of 2009 (Pub. L. 110–417). This process should not be confused with the rebuttal process for past performance information as specified in FAR 42.1503(b).

3. Defective Pricing Information

Comment: One respondent submitted two separate comments suggesting that defective pricing information not be included in PPIRS.

Response: The Councils disagree. The Councils believe that defective cost or pricing data is relevant to other contractor performance information to be considered when evaluating contractor's performance for award of contracts. However, the Councils did clarify in FAR 15.407–1(d) and 42.1503(f) that the contracting officer shall report only the final determination.

4. Relevance and Currency

Comment: One respondent submitted two separate comments on relevance and currency. One comment stated that the FAR does not provide any guidance with respect to relevance when determining the relevance and currency of any termination for cause or default information in PPIRS. The second comment suggested that the rule explain how the contracting officer will evaluate defective pricing information recorded in PPIRS.

Response: The Councils disagree with revising the rule. Relevancy is specific to the instant contract and based on the circumstances of contract performance. Contracting officers are responsible for making a determination of the relevancy of the information. The Councils will

work with the Federal Acquisition Institute and the Defense Acquisition University to develop guidance and training for contracting officials on the proper use of the reported information.

5. Removal of Detrimental Information

Comment: Two respondents submitted comments concerning removal of detrimental information from PPIRS. One comment suggested that the Government remove unfavorable information from PPIRS should it no longer be valid. For example, when terminations for cause or default are converted to termination for convenience or withdrawn the contracting officer should remove from PPIRS any reference to the termination for default. The respondent recommended changing the language at FAR 8.406–8 and 12.403.

Response: The Councils disagree that a change to the rule is necessary. The language at FAR 8.406–4(e), 12.403(c)(4), 15.407–1, and 49.402–8 states that the contracting officer shall report a subsequent withdrawal or a conversion to a termination for convenience in accordance with FAR 42.1503(f).

Comment: Another respondent suggested the Government should be held to the same high standard of record keeping as no system is infallible. Determination of malice and intent should be made before contract termination occurs. Follow-up systems should be in place to make sure that when an error occurs and is corrected that the Government does hold up its side of the bargain and remove detrimental information.

Response: Comment noted. Throughout the revised coverage, language was added that in the event a termination for cause is subsequently converted to a termination for convenience, or otherwise withdrawn, the contracting officer shall ensure that a notice of the conversion or withdrawal is reported in accordance with FAR 42.1503(f).

6. Timing of Posting of Defective Pricing Information

Five comments were received from two respondents regarding the timing and posting of defective pricing information.

Comment: The respondents believe that it is not clear that the intent of this language is to post this information before or after a defective pricing case has been resolved.

Response: The Councils agree. Language was clarified at FAR 15.407–1 to add the word “final” before determination in the coverage. In

addition, a requirement was added to update PPIRS.

Comment: One respondent expressed concern that posting within 10 days is not likely to happen.

Response: The Councils disagree. There were no objections to the 10-day timeframe made by the agencies during the proposed rule comment period. The 10-day timeframe was changed to 3 working days to be synonymous with the requirements of FAPIIS.

Summary of Major Changes to the Proposed Rule

- New coverage at FAR 8.406–8 was moved to FAR 8.406–4(e).
- Language was clarified at FAR 15.407–1 to add “contracting officer’s final” before “determination” in the coverage. A requirement was added to update PPIRS.
- In FAR 42.1503, the 10-day timeframe was changed to 3 working days to be synonymous with the requirements of FAPIIS. Language was clarified on what a “conversion” is. Language was added to address agency focal points.

This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small entities. The collection and reporting of past performance information is an internal process to the Government. The rule merely puts into effect the internal requirement that contracting officers report defective cost or pricing data and terminations for cause or default into PPIRS.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 8, 12, 15, 42, and 49

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 12, 15, 42, and 49 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 12, 15, 42, and 49 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

Part 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Amend section 8.406–4 by adding paragraph (e) to read as follows:

8.406–4 Termination for cause.

* * * * *

(e) *Reporting.* An ordering activity contracting officer, in accordance with agency procedures, shall ensure that information related to termination for cause notices and any amendments are reported. In the event the termination for cause is subsequently converted to a termination for convenience, or is otherwise withdrawn, the contracting officer shall ensure that a notice of the conversion or withdrawal is reported. All reporting shall be in accordance with 42.1503(f).

Part 12—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 12.403 by adding paragraph (c)(4) to read as follows:

12.403 Termination.

* * * * *

(c) * * *

(4) The contracting officer, in accordance with agency procedures, shall ensure that information related to termination for cause notices and any amendments are reported. In the event the termination for cause is subsequently converted to a termination for convenience, or is otherwise withdrawn, the contracting officer shall ensure that a notice of the conversion or withdrawal is reported. All reporting shall be in accordance with 42.1503(f).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.407–1 by revising paragraph (d) to read as follows:

15.407–1 Defective cost or pricing data.

* * * * *

(d) For each advisory audit received based on a postaward review that indicates defective pricing, the contracting officer shall make a

determination as to whether or not the data submitted were defective and relied upon. Before making such a determination, the contracting officer should give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question. The contracting officer shall prepare a memorandum documenting both the determination and any corrective action taken as a result. The contracting officer shall send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the administrative contracting officer (ACO). A copy of the memorandum or other notice of the contracting officer's determination shall be provided to the contractor. When the contracting officer determines that the contractor submitted defective cost or pricing data, the contracting officer, in accordance with agency procedures, shall ensure that information relating to the contracting officer's final determination is reported in accordance with 42.1503(f). Agencies shall ensure updated information that changes a contracting officer's prior final determination is reported into the FAPIIS module of PPIRS in the event of a—

(1) Contracting officer's decision in accordance with the Contract Disputes Act;

(2) Board of Contract Appeals decision; or

(3) Court decision.

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 5. Amend section 42.1502 by adding paragraph (i) to read as follows:

42.1502 Policy.

* * * * *

(i) Agencies shall promptly report other contractor information in accordance with 42.1503(f).

■ 6. Amend section 42.1503 by revising paragraph (a) and adding paragraph (f) to read as follows:

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service. Agency procedures shall identify those responsible for preparing interim and final evaluations. Those individuals identified may obtain information for the evaluation of

performance from the program office, administrative contracting office, audit office, end users of the product or service, and any other technical or business advisor, as appropriate. Interim evaluations shall be prepared as required, in accordance with agency procedures.

* * * * *

(f) *Other contractor information.* (1) Agencies shall ensure information is reported in the FAPIIS module of PPIRS within 3 working days after a contracting officer—

(i) Issues a final determination that a contractor has submitted defective cost or pricing data;

(ii) Makes a subsequent change to the final determination concerning defective cost or pricing data pursuant to 15.407–1(d);

(iii) Issues a final termination for cause or default notice; or

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience.

(2) Agencies shall establish focal points and register users to report data into the FAPIIS module of PPIRS (available at <http://www.cpars.csd.disa.mil>, then select FAPIIS). Instructions on reporting are available at <http://www.ppirs.gov> and at <http://www.ppirs.gov/fapiis.html>.

PART 49—TERMINATION OF CONTRACTS

■ 7. Add section 49.402–8 to read as follows:

49.402–8 Reporting information.

The contracting officer, in accordance with agency procedures, shall ensure that information relating to the termination for default notice and a subsequent withdrawal or a conversion to a termination for convenience is reported in accordance with 42.1503(f).

[FR Doc. 2010–24214 Filed 9–28–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 16**

[FAC 2005–46; FAR Case 2008–008; Item IV; Docket 2009–0036, Sequence 1]

RIN 9000–AL42

**Federal Acquisition Regulation;
Award-Fee Language Revision**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007 entitled, *Appropriate Use of Incentive Contracts*.

DATES: *Effective Date:* October 29, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward Chambers, Procurement Analyst, at 202–501–3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–46, FAR Case 2008–008.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule implements the provisions of section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled “*Appropriate Use of Incentive Contracts*,” by amending and/or integrating where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

This final rule adopts the interim rule with one change for clarification. This clarification entails the addition of the phrase “in the aggregate” to FAR 16.401(e)(2), Table 16–1, and FAR 16.401(e)(3)(v), to make it clear that the objective is to consider the contractor’s cost, schedule, and technical performance in the aggregate when performing award-fee assessments.

B. Discussion and Analysis

An interim rule with request for comments was published in the **Federal Register** on October 14, 2009 (74 FR 52856). The FAR Secretariat received seven responses to the interim rule. These responses included a total of 22 comments on 15 issues. Each issue is discussed in the following sections.

1. Change in DFARS Rule Required

Comment: One respondent wrote that this interim rule, without concurrent change to DFARS, particularly in allowing higher fixed fee, negates the value of this rule change.

Response: DoD is considering a possible DFARS case to address this concern. The Councils further note that the rationale for allowing a higher fixed fee is not clear in this comment. In reading the comment in total, a reasonable inference is that the respondent meant to address base fee and not fixed fee.

2. Clarification Regarding Award-Fee Rating Definitions

Comment: Two respondents commented on the need to clarify whether an unsatisfactory evaluation in one category (e.g., cost) requires an overall unsatisfactory rating and thus no award fee in any category (e.g., schedule and technical) for the evaluation period.

Response: The Council’s intent with the use of “overall cost, schedule, and technical performance in the aggregate” is to avoid the situation where, for example, contractors would receive no award fee in an evaluation period if they were rated below satisfactory on one of the criteria (e.g., in schedule performance) and above satisfactory in other criteria (e.g., technical and cost performance). The Councils believe that this would not be equitable. In such a situation, the contractor could receive a reduced percentage of the award-fee amount to account for the below satisfactory schedule performance, but they would not receive 100 percent of the award-fee amount, nor would they receive zero award fee for that evaluation period. The final rule adds clarifying language of “in the aggregate” to FAR 16.401(e)(2), Table 16–1, and FAR 16.401(e)(3)(v), to make it clear that

the objective is to consider overall cost, schedule, and technical performance in performing award-fee assessments.

3. Requested Clarification as to Whether Firm Fixed Price Award-Fee Contract Is an Incentive Fee Type Contract

Comment: One respondent recommended that the FAR be clarified as to whether a firm-fixed-price award-fee contract is an incentive-type contract citing that the language in FAR 16.404, FAR 16.202–1, and FAR 16.401(a) appears to be contradictory.

Response: The Councils take no position on this recommendation because it is outside the scope of this case, which was limited to the implementation of the section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled “*Appropriate Use of Incentive Contracts*.”

4. Permit Use of Rollover Within Certain Parameters

Comment: Three respondents recommended that the language prohibiting the use of rollover be revised to allow rollover under certain circumstances and at the discretion of the head of the contracting activity. Respondents contend that rollover can be an effective incentive tool if used properly.

Response: The Councils disagree with the respondents. Award fee is structured to incentivize contractors to perform throughout the contract. Therefore, rollover of unearned award fee provides a disincentive for contractors to perform throughout the entire period of performance. If a contractor did not perform adequately during an award-fee rating period and was rated appropriately and then allowed to recover that unearned award fee in a subsequent period, the incentive for the contractor to perform consistently throughout the entire contract would be reduced.

5. Interim Rule Presumes Award-Fee Determinations Represent Only Subjective Measures and Not Objective Measures as Well

Comment: One respondent recommended that the language in FAR 16.401(e)(1)(i) be revised to address the concept that in addition to subjective award-fee performance measures that we also include the use of objective performance measures.

Response: The Councils disagree with this recommendation. A key tenet in determining if an award-fee incentive is suitable for an acquisition is whether one can devise predetermined objective incentives applicable to cost, schedule, and technical performance. If one can, then an award-fee incentive is not appropriate and an incentive arrangement based on predetermined formula-type incentives should be utilized instead.

6. Eliminate Risk and Cost-Benefit Analysis

Comment: Two respondents recommended deleting the requirement to perform a risk and cost-benefit analysis stating that the content and methodology for this analysis is not specified.

Response: The Councils disagree with this recommendation. The FAR currently requires that no award-fee contract shall be awarded unless the contract amount, performance period, and expected benefits are sufficient to warrant the additional administrative effort. This requirement was reinforced in the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled "Appropriate Use of Incentive Contracts." The Councils believe it is within the purview of each Federal agency to provide supplemental guidance on how to perform this analysis.

7. Contractor Should Be Allowed To Earn Award Fee Even if Performance Is Less Than Satisfactory

Comment: One respondent wrote that under an award-fee contract, even when performance is less than satisfactory, there should be some level of fee earnings but potentially at a significantly decreased rate of earnings since the Government received some benefit from the work accomplished. The respondent maintained that even under a fixed-fee contract, a contractor can still earn some amount of fee, even when performance is less than satisfactory. The respondent recommended that Table 16-1 include an additional rating category, entitled "less than satisfactory," with a percentage range from 2 percent-48 percent as well as changing "is below satisfactory" in FAR 16.401(e)(3)(v) to "fail to meet the basic requirements of the contract".

Response: The Councils disagree with this recommendation. Section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) and section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009

(Pub. L. 110-417) were very clear that the FAR "shall ensure that no award fee may be paid for contractor performance that is judged to be below satisfactory performance". The Councils note that the regulations do allow the use of a base fee in an award-fee incentive arrangement.

8. Award-Fee Determination Being Unilateral Decision

Comment: One respondent recommended that the language in FAR 16.401(e)(2) regarding the award-fee determination being a unilateral decision by the Government be struck since the Courts have determined that such decisions are reviewable under the Contract Disputes Act.

Response: The Councils agree that award-fee determinations are reviewable under the Contract Disputes Act but the language in this section does not address that issue. This language in FAR 16.401(e)(2) was included to point out that while the award-fee determination may be subject to the Contract Disputes Act, it is still a unilateral decision by the Government.

9. Consider Different Language Relative to Adjectival Rating Descriptions

Comment: One respondent recommended replacing the word "supplement" with "tailor" in the FAR 16.401(e)(3)(iv) sentence, contracting officers may supplement the adjectival rating description.

Response: The Councils believe that these descriptions cannot be tailored but can be supplemented to fit the specific needs of the acquisition based upon the requirements in section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) and section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), which stated: The FAR "shall establish standards for determining the percentage of the available award fee, if any, which contractors should be paid for performance * * *".

10. Clarification Regarding Adjectival Descriptions

Comment: One respondent wrote that the imprecise adjective modifiers in Table 16-1 could be problematic since what distinguishes "almost all of" from "many" or what establishes a "significant" criterion for "insignificant" criterion. A second respondent recommended revising Table 16-1 to delete the requirement to "exceed" significant award-fee criteria to earn a better than satisfactory rating.

Response: The Councils disagree and maintain that the term "exceeds" is a

reasonable term to differentiate contractor performance between the various ratings. In addition, the adjectives used in the rating table adequately distinguish between the different rating levels and provide the contracting officer with the flexibility to supplement the descriptions as appropriate.

11. Published as Interim Rule

Comment: One respondent wrote that they were disappointed that this rule change was published as an interim rule and not a proposed rule and recommended that the Councils publish rules of this magnitude as proposed rules in the future.

Response: The Councils issued a statement of urgency which was published in the **Federal Register** notice with this interim rule.

12. Stringent Adjectival Ratings

Comment: One respondent wrote that since Table 16-1 adjectival rating descriptions and associated percentages are so stringent, the final rule should specify that the available award-fee pool must be at least 20 percent of estimated costs for complex development contracts.

Response: The Councils do not believe that a pre-established award-fee floor is appropriate since the contracting officer negotiates a fair and reasonable award-fee pool for each acquisition based upon the effort and risk associated with that acquisition.

13. Consider Different Rating Definitions

Comment: One respondent wrote that the final rule should include the rating definitions from the Office of the Under Secretary of Defense/Acquisition, Technology, and Logistics/Defense Procurement and Acquisition Policy memorandum dated April 24, 2007, since these ratings are based on meeting a higher percentage of award-fee criteria in order to earn higher ratings.

Response: The Councils disagree. The two rating scales are very similar but the FAR rating scale provides contracting officers with more latitude in assigning ratings against subjective criteria.

14. Utilization of Base Fee

Comment: Two respondents commented on the utilization of base fee. One respondent recommended that the final rule encourage contracting officers to award base fee on cost-plus-award-fee (CPAF) contracts subject only to the statutory restrictions on fee cited at FAR 15.404-4(c)(4)(i). A second respondent suggested that a minimum fee be referenced in the base amount of fee noted in FAR 16.405-2.

Response: The Councils believe that the contracting officer negotiates a fair and reasonable profit or fee for each acquisition based upon the effort and risk associated with that acquisition. Consequently, it would not be appropriate to encourage the use of or set a minimum base-fee rate, since the establishment of base fee is subject to negotiation and the specific circumstances of each acquisition.

15. Eliminate Requirement Relative to Completing a Determination and Finding

Comment: One respondent wrote that the requirement in the interim rule for a determination and finding (D&F) was redundant with other FAR requirements and increases the workload of overburdened contracting officers without providing any value added. The respondent recommended deleting this requirement in the final rule.

Response: The Councils appreciate the respondent's concern for the contracting officer's workload but disagree with eliminating this requirement from the final rule. The completion of the D&F and Head of Contracting Agency approval satisfy the requirements in section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) and section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) to establish the appropriate approval level for using award-fee contracts. They are also necessary to ensure that the suitability factors to use an award-fee contract are properly addressed and documented because of the large investment of resources required to administer an award-fee contract.

C. Regulatory Planning and Review

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule largely covers a broad range of aspects of award-fee contracting, whose upshot will be a more consistent use and administration of award fees

Governmentwide which will provide a small benefit to all entities both large and small. In addition, the changes promulgated in this final rule do not directly affect the current business processes of Federal contractors. In the matter of the rule's prohibition on the rollover of unearned award fee, the Councils believe this will have a negligible impact on small businesses for the following reasons. First, award-fee contracts are largely the province of large businesses with large dollar contracts. Second, the ability to roll over unearned award fee may have caused evaluators in the past to be more conservative in their ratings because of their awareness that contractors may have a second opportunity to earn unearned award fees.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 52856 on October 14, 2009, is adopted as a final rule with the following changes:

PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

16.401 [Amended]

■ 2. Amend section 16.401 by—

■ a. Removing from paragraph (e)(2) the words “performance is” and adding “performance in the aggregate is” in its place each time it appears (twice);

■ b. Removing from Table 16–1 that follows paragraph (e)(3)(iv) the words “contract as” and adding “contract in the aggregate as” in its place each time it appears (five times); and

■ c. Removing from paragraph (e)(3)(v) the words “performance is” and adding “performance in the aggregate is” in its place.

[FR Doc. 2010–24161 Filed 9–28–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005–46; FAR Case 2009–020; Item V; Docket 2010–0103, Sequence 1]

RIN 9000–AL68

Federal Acquisition Regulation; Offering a Construction Requirement— 8(a) Program

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to revise FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), to conform to the Small Business Administration (SBA) regulations. The FAR Council did not publish this rule for comment because this change will not have a significant effect beyond the internal operating procedures of the Government and will not have a significant effect on contractors or offerors. Furthermore, this requirement has existed in the Small Business Administration Regulations since January 1, 2009, and the FAR is being updated to conform to these regulations. This revision changes the location for submitting offering letters to SBA for a construction requirement for which a specific offeror is nominated and impacts internal procedures that the contracting officer is now required to follow.

DATES: *Effective Date:* October 29, 2010

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–46, FAR case 2009–020.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to revise FAR 19.804–2(b) to conform to the SBA regulation 13 CFR 124.502(b)(3). The current FAR requires sole source offerings for construction

requirements be submitted to the SBA District Office for the geographical area where the work is to be performed. However, the SBA regulation requires the offering letters for sole source requirements offered on behalf of a specific participant be submitted to the SBA district office servicing that concern.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501-3(a) and 41 U.S.C. 418b, and publication for public comments is not required.

The Councils will consider comments from small entities concerning the existing regulations in the part affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-46, FAR Case 2009-020) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 19

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 19.804-2 by—

■ a. Revising paragraph (b)(1); and
■ b. Redesignating paragraph (b)(2) as paragraph (b)(3); and adding a new paragraph (b)(2).

■ The revised and added text reads as follows:

19.804-2 Agency offering.

* * * * *

(b)(1) An agency offering a construction requirement for which no specific offeror is nominated should submit it to the SBA District Office for the geographical area where the work is to be performed.

(2) An agency offering a construction requirement on behalf of a specific offeror should submit it to the SBA District Office servicing that concern.

* * * * *

[FR Doc. 2010-24163 Filed 9-28-10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 23 and 52

[FAC 2005-46; FAR Case 2009-028; Item VI; Docket 2010-0097, Sequence 1]

RIN 9000-AL64

Federal Acquisition Regulation; Encouraging Contractor Policies To Ban Text Messaging While Driving

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13513, issued on October 1, 2009, entitled “Federal Leadership on Reducing Text Messaging while Driving.” This Executive Order was issued to demonstrate Federal leadership in improving safety on the nation’s roads and highways, and to enhance the efficiency of Federal contracting. The purpose of this policy is to prevent the unsafe practice of text messaging by Federal contractors while driving in connection with Government business. This policy further promotes economy and efficiency in Federal procurement, and seeks to prohibit the disruption of Government business and Federal procurement, as a result of unsafe text messaging practices.

DATES: *Effective Date:* September 29, 2010.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after September 29, 2010.

However, contracting officers are encouraged to modify existing contracts, in accordance with FAR 1.108(d)(3), to include the FAR clause.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before November 29, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-46, FAR Case 2009-028, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009-028” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009-028.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009-028” on your attached document.

- *Fax:* 202-501-4067.

- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Attn: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-46, FAR Case 2009-028, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. William Clark, Procurement Analyst, at (202) 219-1813. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-46, FAR Case 2009-028.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule revises the Federal Acquisition Regulation to implement Executive Order 13513, issued on October 1, 2009 (74 FR 51225, October 6, 2009), entitled “Federal Leadership on Reducing Text Messaging while Driving.”

Text messaging while driving causes drivers to take their eyes off the road and at least one hand off the steering wheel, endangering both themselves and others. In order to implement the Executive order, this interim rule creates a new subpart in FAR part 23 and an associated clause to encourage Federal contractors and subcontractors to adopt and enforce policies that ban text messaging while driving—

- Company-owned or -rented vehicles or Government-owned vehicles; or
- Privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.

It also encourages Federal contractors, in connection with a Government contract, to conduct initiatives, commensurate with the size of the business, such as—

- Establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving; and
- Education, awareness, and other outreach programs to inform employees about the safety risks associated with texting while driving.

The clause does not flow down to subcontracts below the micro-purchase level, because the FAR applies only a very few clauses to acquisitions below the micro-purchase threshold. According to FAR 13.201(d), micro-purchases do not require provisions or clauses except as provided in FAR 4.1104 (Central Contractor Registration) and FAR 32.1110 (Electronic Funds Transfer). Therefore, it is reasonable not to require flow down below the micro-purchase level. However, Federal Contractors are encouraged to comply with this requirement to prevent the unsafe practice of text messaging while driving in connection with Government business. This requirement applies to all solicitations and contracts. This requirement also applies to grants and cooperative agreements. Separate guidance may be issued by the Office of Federal Financial Management regarding grants and cooperative agreements.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule is not mandatory for contractors, including small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in

parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–46, FAR Case 2009–028) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this rule implements Executive Order 13513, “Federal Leadership on Reducing Text Messaging While Driving,” which had a required date for agency implementation of 90 days from the date of the order (October 1, 2009). An interim rule is necessary to improve safety on our roads and highways and to enhance the efficiency of Federal contracting. Specifically, this order requires agencies to encourage Federal contractors and subcontractors to adopt and enforce policies banning text messaging while driving company-owned or -rented vehicles or Government-owned vehicles, or while driving personally-owned vehicles when on official Government business or when performing any work for or on behalf of the Government. The Councils believe an interim rule in the FAR will provide the Contracting Officer the relevant regulatory guidance needed when addressing requirements outlined in the Executive Order. However, pursuant to 41 U.S.C. 418b and FAR 1.501–3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 23 and 52

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 23 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 23 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 2. Amend section 23.000 by revising the introductory text; removing from paragraph (e) the period and adding “; and” in its place; and adding paragraph (f) to read as follows:

23.000 Scope.

This part prescribes acquisition policies and procedures supporting the Government’s program for ensuring a drug-free workplace, for protecting and improving the quality of the environment, and encouraging the safe operation of vehicles by—

* * * * *

(f) Encouraging contractors to adopt and enforce policies that ban text messaging while driving.

■ 3. Add Subpart 23.11 to read as follows:

Subpart 23.11—Encouraging Contractor Policies to ban text messaging while driving

Sec.

23.1101 Purpose.

23.1102 Applicability.

23.1103 Definitions.

23.1104 Policy.

23.1105 Contract clause.

Subpart 23.11—Encouraging Contractor Policies to Ban Text Messaging While Driving

23.1101 Purpose.

This subpart implements the requirements of the Executive Order (E.O.) 13513, dated October 1, 2009 (74 FR 51225, October 6, 2009), Federal Leadership on Reducing Text Messaging while Driving.

23.1102 Applicability.

This subpart applies to all solicitations and contracts.

23.1103 Definitions.

As used in this subpart—

Driving—(1) Means operating a motor vehicle on an active roadway with the motor running, including while temporarily stationary because of traffic, a traffic light, stop sign, or otherwise.

(2) Does not include operating a motor vehicle with or without the motor running when one has pulled over to

the side of, or off, an active roadway and has halted in a location where one can safely remain stationary.

Text messaging means reading from or entering data into any handheld or other electronic device, including for the purpose of short message service texting, e-mailing, instant messaging, obtaining navigational information, or engaging in any other form of electronic data retrieval or electronic data communication. The term does not include glancing at or listening to a navigational device that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device either before driving or while stopped in a location off the roadway where it is safe and legal to park.

23.1104 Policy.

Agencies shall encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while driving—

(a) Company-owned or –rented vehicles or Government-owned vehicles; or

(b) Privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.

23.1105 Contract clause.

The contracting officer shall insert the clause at 52.223–18, Contractor Policy to Ban Text Messaging While Driving, in all solicitations and contracts.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–5 by revising the date of clause; redesignating paragraphs (b)(31) thru (b)(43) as paragraphs (b)(32) thru (b)(44); and adding a new paragraph (b)(31) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (Sep 2010)

* * * * *

(b) * * *

(31) 52.223–18, Contractor Policy to Ban Text Messaging while Driving (SEP 2010) (E.O. 13513).

* * * * *

■ 5. Add section 52.223–18 to read as follows:

52.223–18 Contractor Policy to Ban Text Messaging While Driving.

As prescribed in 23.1105, insert the following clause:

CONTRACTOR POLICY TO BAN TEXT MESSAGING WHILE DRIVING (SEP 2010)

(a) *Definitions.* As used in this clause—
Driving—(1) Means operating a motor vehicle on an active roadway with the motor running, including while temporarily stationary because of traffic, a traffic light, stop sign, or otherwise.

(2) Does not include operating a motor vehicle with or without the motor running when one has pulled over to the side of, or off, an active roadway and has halted in a location where one can safely remain stationary.

Text messaging means reading from or entering data into any handheld or other electronic device, including for the purpose of short message service texting, e-mailing, instant messaging, obtaining navigational information, or engaging in any other form of electronic data retrieval or electronic data communication. The term does not include glancing at or listening to a navigational device that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device either before driving or while stopped in a location off the roadway where it is safe and legal to park.

(b) This clause implements Executive Order 13513, Federal Leadership on Reducing Text Messaging while Driving, dated October 1, 2009.

(c) The Contractor should—

(1) Adopt and enforce policies that ban text messaging while driving—

(i) Company-owned or –rented vehicles or Government-owned vehicles; or

(ii) Privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.

(2) Conduct initiatives in a manner commensurate with the size of the business, such as—

(i) Establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving; and

(ii) Education, awareness, and other outreach to employees about the safety risks associated with texting while driving.

(d) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts that exceed the micro-purchase threshold.

(End of clause)

[FR Doc. 2010–24156 Filed 9–28–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 2005–46; FAR Case 2009–039; Item VII; Docket 2010–0104, Sequence 1]

RIN 9000–AL62

Federal Acquisition Regulation; Buy American Exemption for Commercial Information Technology—Construction Material

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117). Section 615 authorizes exemption from the Buy American Act for acquisition of information technology that is a commercial item.

DATES: *Effective Date:* September 29, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before November 29, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–46, FAR Case 2009–039, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–039” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009–039.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–039” on your attached document.

- *Fax:* 202–501–4067.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–46, FAR Case 2009–039, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–46, FAR Case 2009–039.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends FAR subparts 25.2 and 52.2 to implement section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117). Section 615 authorizes exemption from the Buy American Act for acquisition of information technology that is a commercial item.

This same exemption has appeared every year since Fiscal Year 2004 (section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004 (Pub. L. 108–199)). The Fiscal Year 2004 exemption was implemented through deviations by the individual agencies. Subsequently, regulations were published to implement the exemption for supplies (71 FR 223, January 3, 2006). The exemption for construction material was not implemented until publication of this interim rule.

The interim rule is based on the probability that the exemption of commercial information technology is likely to continue. If the exception does not appear in a future appropriations act, a prompt change to the FAR will be made to limit applicability of the exemption to the fiscal years to which it applies.

“Information technology” and “Commercial item” are already defined in FAR part 2.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule simplifies the treatment of

construction material that is also a commercial information technology item, which constitutes a small percentage of the overall construction material in a project. This interim rule does not affect small business set-asides to the prime contractor or the small business subcontracting goals. Construction contracts that exceed \$7,804,000 and are subject to trade agreements already exempt designated country construction material from the Buy American Act. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in the FAR subparts 25 and 52 affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–46, FAR Case 2009–039) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply because the changes to the FAR will slightly reduce the information collection requirements currently approved by the Office of Management and Budget (OMB Control number 9000–0141, entitled Buy America Act—Construction—FAR Sections Affected: Subpart 25.2; 52.225–9; and 52.225–11) but we estimate that the impact will be negligible.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement the changes resulting from the enactment of section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117), effective December 16, 2009. However, pursuant to 41 U.S.C. 418b and FAR 1.501–3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 25 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 25—FOREIGN ACQUISITION

■ 2. Amend section 25.202 by revising the introductory text of paragraph (a), and by adding paragraph (a)(4) to read as follows:

25.202 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to acquire foreign construction materials without regard to the restrictions of the Buy American Act:

* * * * *

(4) *Information technology that is a commercial item.* The restriction on purchasing foreign construction material does not apply to the acquisition of information technology that is a commercial item, when using Fiscal Year 2004 or subsequent fiscal year funds (Section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 52.225–9 by revising the date of the clause and paragraph (b)(2) to read as follows:

52.225–9 Buy American—Construction Materials.

* * * * *

BUY AMERICAN—CONSTRUCTION MATERIALS (SEP 2010)

* * * * *

(b) * * *

(2) This requirement does not apply to information technology that is a commercial item or to the construction materials or components listed by the Government as follows:

* * * * *

■ 4. Amend section 52.225–11 by revising the date of the clause and paragraph (b)(3) to read as follows:

52.225–11 Buy American Act—Construction Materials under Trade Agreements.

* * * * *

BUY AMERICAN ACT—
CONSTRUCTION MATERIALS UNDER
TRADE AGREEMENTS (SEP 2010)

* * * * *

(b) * * *
(3) The requirement in paragraph (b)(2) of this clause does not apply to information technology that is a commercial item or to the construction materials or components listed by the Government as follows:

[Contracting Officer to list applicable
excepted materials or indicate “none”]

* * * * *

[FR Doc. 2010–24206 Filed 9–28–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATION

NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0077, Sequence 8]

Federal Acquisition Regulation;
Federal Acquisition Circular 2005–46;
Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued
under the joint authority of the
Secretary of Defense, the Administrator
of General Services and the
Administrator of the National

Aeronautics and Space Administration.
This *Small Entity Compliance Guide* has
been prepared in accordance with
section 212 of the Small Business
Regulatory Enforcement Fairness Act of
1996. It consists of a summary of rules
appearing in Federal Acquisition
Circular (FAC) 2005–46 which amend
the FAR. Interested parties may obtain
further information regarding these
rules by referring to FAC 2005–46,
which precedes this document. These
documents are also available via the
Internet at <http://www.regulations.gov>.

DATES: For effective dates see separate
documents, which follow.

FOR FURTHER INFORMATION CONTACT: The
analyst whose name appears in the table
below. Please cite FAC 2005–46 and the
specific FAR case number. For
information pertaining to status or
publication schedules, contact the
Regulatory Secretariat at (202) 501–
4755.

LIST OF RULES IN FAC 2005–46

Item	Subject	FAR case	Analyst
I	Equal Opportunity for Veterans (Interim)	2009–007	Woodson.
II	Certification Requirement and Procurement Prohibition Relating to Iran Sanctions (Interim)	2010–012	Davis.
III	Termination for Default Reporting	2008–016	Parnell.
IV	Award-Fee Language Revision	2008–008	Chambers.
V	Offering a Construction Requirement–8(a) Program	2009–020	Morgan.
VI	Encouraging Contractor Policies to Ban Text Messaging While Driving (Interim)	2009–028	Clark.
VII	Buy American Exemption for Commercial Information Technology—Construction Material (Interim)	2009–039	Davis.

SUPPLEMENTARY INFORMATION:
Summaries for each FAR rule follow.
For the actual revisions and/or
amendments made by these FAR cases,
refer to the specific item number and
subject set forth in the documents
following these item summaries.
FAC 2005–46 amends the FAR as
specified below:

Item I—Equal Opportunity for Veterans
(FAR Case 2009–007) (Interim)

This interim rule with request for
comments implements the Department
of Labor’s (DoL) Office of Federal
Contract Compliance Programs (OFCCP)
final rule published in the **Federal
Register** at 72 FR 44393 on August 8,
2007, that implements amendments to
the affirmative action provisions of the
Vietnam Era Veterans’ Readjustment
Assistance Act of 1972 (VEVRAA), as
amended by the Jobs for Veterans Act
(JVA). The rule re-titles FAR subpart
22.13 from “Special Disabled Veterans,
Veterans of the Vietnam Era, and Other
Eligible Veterans” to “Equal Opportunity
for Veterans.” Accordingly, FAR clause
52.222–35 is also renamed “Equal
Opportunity for Veterans” and

incorporates the new categories and
definitions of protected veterans as
established by DoL. In addition, the
FAR clause at 52.222–37, “Employment
Reports on Special Disabled Veterans,
Veterans of the Vietnam Era, and Other
Eligible Veterans” is renamed
“Employment Reports on Veterans” and
the new DoL requirements for using the
VETS–100A report are incorporated.
Lastly, the FAR provision at 52.222–38,
“Compliance with Veterans’
Employment Reporting Requirements,”
is revised to incorporate new title
references for FAR 52.222–37 and the
new report form VETS–100A.

Item II—Certification Requirement and
Procurement Prohibition Relating to
Iran Sanctions (FAR Case 2010–012)
(Interim)

This interim rule amends the FAR by
enhancing efforts to enforce sanctions
with Iran. The rule implements
requirements imposed by the
Comprehensive Iran Sanctions,
Accountability, and Divestment Act of
2010 (Pub. L. 111–195), specifically
sections 102 and 106. To implement
section 102, the FAR will require

certification that each offeror, and any
person owned or controlled by the
offeror, does not engage in any activity
for which sanctions may be imposed
under section 5 of the Iran Sanctions
Act. This rule also partially implements
section 106 of Public Law 111–195,
which imposes a procurement
prohibition relating to contracts with
persons that export certain sensitive
technology to Iran. There will be further
implementation of Section 106 in FAR
Case 2010–018. This rule will have little
effect on United States small business
concerns, because such dealings with
Iran are already prohibited in the United
States.

Item III—Termination for Default
Reporting (FAR Case 2008–016)

This final rule amends the FAR to
revise the contractor performance
information process. The FAR revisions
include changes to FAR parts 8, 12, 15,
42, and 49. The purpose of the rule is
to establish procedures for contracting
officers to provide contractor
information into the Federal Awardee
Performance & Integrity Information
System (FAPIS) module of Past

Performance Information System (PIRS). This case sets forth requirements for reporting defective cost or pricing data and terminations for cause or default and any amendments. Evaluation of past performance information, especially terminations, manages risks associated with timely, effective and cost efficient completion of contracts, a key objective of the President's March 4, 2009, Memorandum on Government Contracting.

Item IV—Award-Fee Language Revision (FAR Case 2008–008)

This final rule converts the interim rule published in the **Federal Register** at 74 FR 52856 on October 14, 2009, to a final rule with minor changes.

This final rule amends the FAR to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 and section 867 of the Duncan Hunter 2009 National Defense Authorization Act for Fiscal Year 2009. This rule requires agencies to—

(1) Link award fees to acquisition objectives in the areas of cost, schedule, and technical performance;

(2) Clarify that a base fee amount greater than zero may be included in a cost-plus-award-fee type contract at the discretion of the contracting officer;

(3) Prescribe narrative ratings that will be utilized in award-fee evaluations;

(4) Prohibit the issuance of award fees for a rating period if the contractor's performance is judged to be below satisfactory;

(5) Conduct a risk and cost-benefit analysis and consider the results of the analysis when determining whether to use an incentive-fee type contract or not;

(6) Include specific content in the award-fee plans; and

(7) Prohibit the rolling over of unearned award fees to subsequent rating periods.

This FAR change will integrate where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

Item V—Offering a Construction Requirement—8(a) Program (FAR Case 2009–020)

This final rule amends the FAR to revise FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), specifically FAR 19.804–2(b) to conform to the Small Business Administration (SBA) regulations. The SBA regulation 13 CFR 124.502(b)(2) requires that the offering letter for an open construction requirement be submitted to the SBA District Office for the geographical area where the work is to be performed. The SBA regulation 13 CFR 124.502(b)(3) requires that the offering letter for a construction requirement offered on behalf of a specific participant be submitted to the SBA District Office servicing that concern. This rule revises FAR 19.804–2 accordingly.

Item VI—Encouraging Contractor Policies To Ban Text Messaging While Driving (FAR Case 2009–028) (Interim)

This interim rule amends the FAR to implement Executive Order 13513, entitled “Federal Leadership on Reducing Text Messaging while Driving,” which was issued on October 1, 2009 (74 FR 51225, October 6, 2009). Section 4 of the Executive order requires

each Federal agency, in procurement contracts, entered into after the date of the order, to encourage contractors and subcontractors to adopt and enforce policies that ban text messaging while driving company-owned or -rented vehicles or Government-owned vehicles; or privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government. Section 4 also requires Federal agencies to encourage contractors to conduct initiatives such as establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving, and education, awareness, and other outreach programs to inform employees about the safety risks associated with texting while driving. This requirement applies to all solicitations and contracts. Contracting officers are encouraged to modify existing contracts to include the FAR clause.

Item VII—Buy American Exemption for Commercial Information Technology—Construction Material (FAR Case 2009–039) (Interim)

This interim rule implements section 615 of Division C, Title VI, of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117). Section 615 authorizes exemption from the Buy American Act for acquisition of information technology that is a commercial item.

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Edward Loeb,

Director, Acquisition Policy Division.

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